UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

NOV 13 1991

MEMORANDUM

SUBJECT: Hydrocarbon Recyclers, Inc. (HRI) of Wichita, KS

FROM: Mark Matthews, RCRA/PRMT

THRU: Lyndell Harrington, Chief, Permits Section, WSTM/RCRA
Michael Sanderson, Chief, RCRA Branch, WSTM

TO: Baerbel Schiller
Associate Regional Counsel
Hazardous Waste/RCRA Emphasis Branch

Hydrocarbon Recyclers, Inc. (HRI) of Wichita, Kansas is an interim status RCRA treatment and storage facility for which we plan to issue a HSWA permit in FY 1992. At this point we are trying to determine the bounds of the area subject to corrective action under 3004(u) of RCRA. The following information is pertinent to that decision: The property is owned by the Trombold brothers and the facility is operated by USPCI under a lease/buy option agreement. USPCI took over operation of the facility in 1989. The parent company of USPCI is Union Pacific Corporation (see attached legal structure organizational chart). Union Pacific also owns and/or operates at least two properties contiguous to the HRI facility: a railroad switching yard and grain elevator and an overnight trucking company. The proposed Subpart S rule (relevant portion attached) indicates the "facility" subject to 3004(u) corrective action should be, in this case, all the contiguous property owned or operated by Union Pacific. A literal interpretation of the proposed Subpart S rule would have thousands of miles of railroad track stretching across the United States, and properties contiguous to the railroad track which are owned or operated by Union Pacific or its affiliated companies, subject to 3004(u) corrective action.

Bearing in mind that the switchyard, grain elevator and trucking company are within the bounds of an NPL Superfund site (29th and Mead site, see attached map) and consequently are PRPs, we feel that a reasonable use of 3004(u) authority would have us looking only at the HRI site. We would appreciate your opinion of our legal obligations in this matter. Belinda Holmes is the attorney for the 29th and Mead site.

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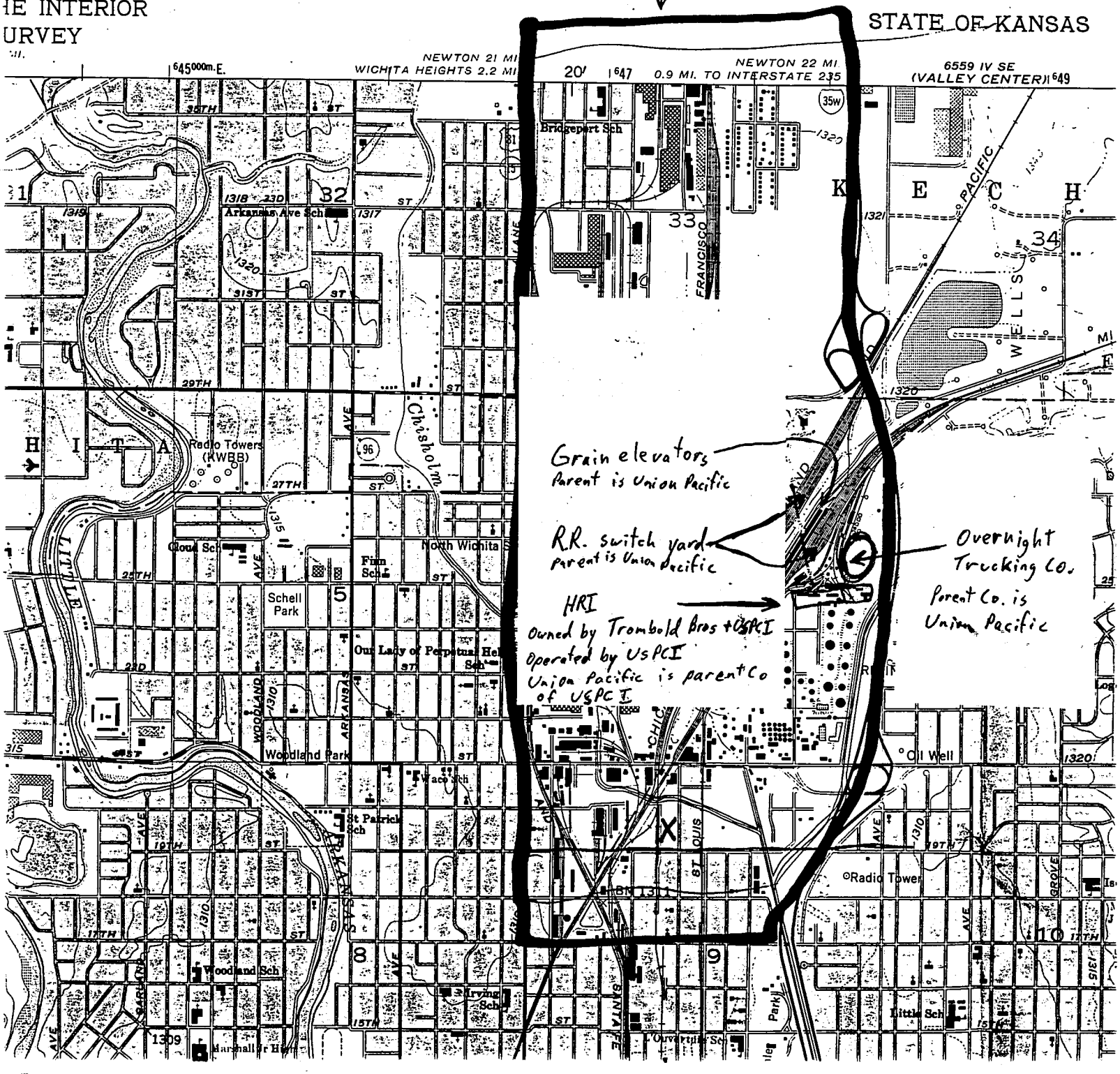

later date. This will also hold for cleanup actions reviewed by the Agency that are not subject to permit modifications. It is not possible for the Agency to delegate to owner/operators the ultimate responsibility for ensuring that remedial activities fully satisfy RCRA's statutory requirement for protection of human health and the environment.

The Agency solicits comments on the approach to voluntary corrective action described above.

B. Definitions (Section 264.501)

EPA is today proposing to define five key terms which apply specifically to this subpart.

1. *Facility.* In the July 15, 1985, Codification Rule, EPA interpreted the term "facility" in the context of section 3004(u) to mean all contiguous property under the control of the owner/operator of a facility seeking a permit under subtitle C. This interpretation was upheld in a decision of the U.S. District Court of Appeals (*United Technologies Corporation* vs. *U.S. EPA*, 821 F2d 714 (DC Cir. 1987)). Thus, by proposing this interpretation as the definition of facility in today's rule, EPA is not modifying its basic interpretation as previously elaborated for the purpose of implementing section 3004(u). There are, however, several aspects of this definition which merit further clarification.

The definition of facility in today's proposal at § 264.501 is not intended to alter or subsume the existing—and narrower—definition of "facility" that is given in 40 CFR 260.10. That definition describes the facility as "* * * all contiguous land and structures * * * used for treating, storing or disposing of hazardous waste * * *" EPA intends to retain this definition for the purposes of implementing RCRA subtitle C requirements, with the exception of subpart S corrective action (including those provisions governing corrective action for regulated units). At the same time, however, the Agency is reviewing its uses of the term "facility" in other parts of the subtitle C regulations to ensure consistent usage.

Today's proposed definition refers to "contiguous property" under the control of the owner/operator. Several questions have been raised as to the Agency's interpretation of "contiguous property" in the context of defining the areal limits of the facility. Clearly, property that is owned by the owner/operator that is located apart from the facility (*i.e.*, is separated by land owned by others) is not part of the "facility." EPA does intend, however, to consider property that is separated only by a public right-of-way (such as a roadway or a power transmission right-of-way) to be contiguous property. The term "contiguous property" also has significant additional meaning when applied to a facility where the owner is a different entity from the operator. For example, if a 100-acre parcel of land were owned by a company that leases five acres of it to another company that, in turn, engages in hazardous waste management on the five acres leased, the "facility" for the purposes of corrective action would be the entire 100-acre parcel. Likewise, if (in the same example) the operator also owned 20 acres of land located contiguous to the 100-acre parcel, but not contiguous to the five-acre parcel, the facility would be the combined 120 acres. EPA invites comment on these interpretations of contiguous property.

In some cases, adjacent properties may be separately owned by two different subsidiaries of a parent company, where only one of the subsidiaries' operations involves management of hazardous wastes. In such cases, EPA intends to consider the ownership to be held by the parent corporation. Thus, in the example provided, the facility would include both properties.

EPA acknowledges that, in some situations, "ownership" of property can involve a complex legal determination. EPA solicits comment and information on the interpretation offered in general, and specifically on the issue of how ownership or "control" of property should be determined in the context of subsidiary-parent companies.

2. *Release.* Today's proposal includes the definition of "release" articulated in the preamble to the July 15, 1985, Codification Rule. This definition essentially repeats the CERCLA definition of release. Today's proposed definition also includes language from SARA which extended the concept of "release" to include abandoned or discarded barrels, containers, and other closed receptacles containing hazardous wastes or hazardous constituents.

Although this definition of release is quite broad, section 3004(u) is limited to addressing releases from solid waste management units. Thus, there may be releases at a facility that are not associated with solid waste management units, and that are therefore not subject to corrective action under this authority. (See discussion below which defines solid waste management unit.)

Many facilities have releases from solid waste management units that are issued permits under other environmental laws. For example, stack emissio
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However, in the cour
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where permitted releases
have created threats to hu
and the environment. In suc
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office for action. If the permitti
authority is unable to compel co
action for the release, EPA will t
necessary action under section 30
(for facilities with RCRA permits) o
section 3008(h) (for interim status
facilities), as appropriate, and to the
extent not inconsistent with certain
applicable laws (see section 1006(a) of
RCRA).

3. *Solid Waste Management Unit (SWMU).* Today's rule proposes the following definition of solid waste management unit:

> Any discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include any area at a facility at which solid wastes have been routinely and systematically released.

This definition is also derived from the Agency interpretation discussed in the July 15, 1985, Codification Rule. A discernible unit in this context includes the types of units typically identified with the RCRA regulatory program, including landfills, surface impoundments, land treatment units, waste piles, tanks, container storage areas incinerators, injection wells, wastewater treatment units, waste recycling units, and other physical, chemical or biological treatment units.

The proposed definition also includes as a type of solid waste management unit those areas of a facility at which solid wastes have been released in a routine and systematic manner. One example of such a unit would be a wood preservative "kickback drippage" area, where pressure treated wood is stored in a manner which allows preservative fluids routinely to drip onto the soil, eventually creating an area of highly contaminated soils. Another example might be a loading/unloading area at a

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PRMT	PRMT	PRMT	RCRA
MATTHEWS	BARTLEY	HARRINGTON	SANDERSON
MZM	EWB	LH	
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